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No. 256

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH W. DI SILVESTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
GEO. S. LEONARD,
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OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (Pet. App. A, pp. 12–15) is reported at 181 F. Supp. 860. The Court of Appeals for the Second Circuit affirmed on the opinion of the District Court (Pet., p. 1; Pet. App. A, p. 16).

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1960. A timely-filed petition for rehearing was denied on June 15, 1960. The petition for a writ of certiorari was filed on July 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, by bringing an action against the United States under the Federal Tort Claims Act, is entitled to obtain judicial review of the decision of the Administrator of Veterans' Affairs forfeiting petitioner's benefits and pension rights, when Section 211 of Title 38 of the United States Code expressly provides that the decision of the Administrator is to be final.

2. Whether petitioner is entitled to damages for the release of information by the Veterans' Administration, with respect to the actions and proceedings instituted by petitioner, to two members of the United States Senate whom petitioner had requested to intervene in his behalf.

3. Whether 28 U.S.C. 2680(h) bars an action for libel against the United States under the Tort Claims Act.

STATUTES INVOLVED

1. 38 U.S.C. 211 (formerly 38 U.S.C. (1952 ed.) 705) provides, in relevant part, as follows:

> *Decisions by Administrator; opinions of Attorney General.* (a) Except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.

* * * * *

2. 28 U.S.C. 2680 provides, in relevant part, as follows:

> *Exceptions.* The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
>
> * * * * *

STATEMENT

This is another attempt by this petitioner to obtain judicial review of the action of the Administrator of Veterans' Affairs in forfeiting certain benefits and pension rights on the ground of fraud. In a number of prior actions brought by petitioner it has been held that such review is foreclosed by 38 U.S.C. 211, *supra*, p. 2 (formerly 38 U.S.C. (1952 ed.) 705). See *Di Silvestro* v. *United States Veterans' Administration*, 81 F. Supp. 844 (E.D.N.Y.), affirmed, 173 F. 2d 933 (C.A. 2); *Di Silvestro* v. *United States Veterans' Administration*, 9 F.R.D. 435 (E.D.N.Y.);

Di Silvestro v. *United States Veterans' Administration*, 10 F.R.D. 20 (E.D.N.Y.), affirmed, 181 F. 2d 502 (C.A. 2), certiorari denied, 339 U.S. 989; *Di Silvestro* v. *Gray*, 194 F. 2d 355 (C.A.D.C.), certiorari denied, 343 U.S. 930; *Di Silvestro* v. *United States Veterans' Administration*, 132 F. Supp. 692 (E.D.N.Y.), affirmed, 228 F. 2d 516 (C.A. 2), certiorari denied, 350 U.S. 1009, rehearing denied, 351 U.S. 928; *Di Silvestro* v. *United States Veterans' Administration*, 151 F. Supp. 337 (E.D.N.Y.), application for leave to appeal in forma pauperis denied November 7, 1958, certiorari denied, 355 U.S. 935, rehearing denied, 355 U.S. 968. In the present case, petitioner seeks to invoke the Tort Claims Act as a basis for litigating his controversy with the Administrator.

Two of the counts in petitioner's complaint asserted in substance that the Administrator's decision pertaining to his pension and disability rights was wrongful and amounted to negligence *per se* (Pet. App. A, p. 13). A third count claimed that there had been a wrongful disclosure of confidential and privileged documents in petitioner's Veterans' Administration file and that the unauthorized recipients of the documents had furnished the information upon which the administrative decision was based (Pet. App. A, p. 13). The remaining two counts alleged a wrongful disclosure of confidential and privileged information to Senators Javits and Keating and charged that some of the information so supplied was false (Pet. App. A, p. 14). Damages were sought in the amount of $2,000,000.

The District Court granted summary judgment to the United States. It held that, apart from the counts pertaining to information purportedly supplied to the Senators, the complaint represented an impermissible endeavor to avoid the effect of the rulings in the earlier suits brought by petitioner that 38 U.S.C. 211, *supra*, p. 2, precludes judicial review of the Administrator's action in forfeiting his veteran's benefits for fraud (Pet. App. A, pp. 13–14). In the court's view, Section 211 cannot be circumvented by the filing of an action under the Tort Claims Act. With respect to the other counts, the court found that petitioner had requested Senators Javits and Keating to intercede on his behalf and that, since the information was only as to the proceedings which had taken place, there was nothing of a confidential or privileged nature released (Pet. App. A, p. 14). Further, the court determined that it could not consider the allegation that certain of the supplied information was false, in view of 28 U.S.C. 2680(h), *supra*, p. 3, which excepts from the ambit of the Tort Claims Act "claims arising out of * * * libel" (Pet. App. A, pp. 14–15). The Court of Appeals affirmed on the opinion of the District Court (Pet., p. 1).

ARGUMENT

Petitioner once again seeks to obtain judicial review of the action of the Administrator of Veterans' Affairs in forfeiting his veteran's benefits for fraud. All of his prior actions were dismissed on the ground that, by reason of 38 U.S.C. 211 (formerly 38 U.S.C. (1952 ed.) 705), *supra*, p. 2, the Administrator's

decision was "final and conclusive" and not subject to review by "any court of the United States." To avoid the force of this clear Congressional mandate, petitioner now looks to the Tort Claims Act as a basis for relief. But, as both courts below held, that Act does not confer jurisdiction to review determinations which Congress has expressly declared that no court shall have "power or jurisdiction" to review. Moreover, the claim is barred by the provisions of 28 U.S.C. 2680(a), *supra*, p. 3, which exclude from the coverage of the Tort Claims Act any claim based upon the exercise of a discretionary function.

The courts below also were clearly correct in ruling that there was nothing in the information disclosed to Senators Javits and Keating which was privileged or confidential. Petitioner had requested the Senators to intervene on his behalf and the District Court found that they were only supplied with information as to the actions brought by petitioner and the proceedings which resulted. Certainly such information, being public in nature, bore no privilege. Further, the count alleging that the Veterans' Administration knowingly released untrue and false information to Senators Javits and Keating is barred by 28 U.S.C. 2680(h), *supra*, p. 3, which excepts from the Tort Claims Act claims arising out of libel.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEO. S. LEONARD,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
Attorney.

AUGUST 1960.